

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(a). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115(a).

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ARMANDO J. MUNOZ,

Defendant and Appellant.

B253114

(Los Angeles County
Super. Ct. No. YA081529)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Steven R. Van Sicklen, Judge. Affirmed.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr.
and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Armando Munoz appeals his conviction by a jury on two counts of continuous sexual abuse of a child under 14 years of age in violation of Penal Code section 288.5, subdivision (a). The victims, S.G. and B.G., testified that Munoz (their uncle) molested them on multiple occasions when they were between the ages of 6 and 11.

Munoz complains the trial court made a number of incorrect evidentiary rulings during the trial that rendered his trial unfair in violation of his right to due process as guaranteed by the United States Constitution. Specifically, he contends the court erred by limiting the number of character witnesses to testify for the defense, excluding his post-arrest statement declaring himself innocent, and allowing the prosecution to present expert testimony regarding child sexual abuse accommodation syndrome (CSAAS). Munoz also contends the trial court incorrectly instructed the jury concerning the role of CSAAS evidence. We find no error in any of the trial court's evidentiary rulings or in its use of the standard CALCRIM instruction (No. 1193) regarding CSAAS evidence. Accordingly, we affirm.

FACTS AND PROCEDURAL BACKGROUND

A. The Sexual Abuse

S.G. and B.G. are twins. From the time the twins were five years old until they were 11 years old, the twins' aunt (Martha Munoz) and uncle (the defendant) frequently picked them up after school and babysat them for several hours. Munoz was often alone with the twins during that time. S.G. testified the first incident of molestation occurred when she was six years old. She was watching a movie in bed with B.G. and Munoz. Munoz reached under the covers, put his hand in her underpants, and rubbed her vagina. S.G. told Munoz to stop, but he continued and then told her not to tell anyone about the incident. S.G. testified Munoz touched her in this way at least 20 times when she was between the ages of six and 11. On one occasion, Munoz touched her vagina with his penis.

B.G. testified that during the same five year period, Munoz touched B.G.'s penis at least ten times. Munoz also made B.G. touch Munoz's penis at least ten times during

those years. In addition, on at least one occasion Munoz made the twins watch a pornographic movie and then tried to make them have sex with each other. Munoz often bought the twins ice cream after these incidents.

The abuse stopped when the twins were 11 years old, after they told their mother they no longer wanted to go to Munoz's house after school.

B. *The Disclosure of the Sexual Abuse*

The twins did not discuss the sexual abuse with each other or with anyone else at the time or in the years that followed. It was not until mid-January 2011, when the twins were 15 years old, that S.G. told her mother about the sexual abuse. S.G. testified her mother (C.V.) was distressed about S.G.'s poor grades and threatened to send her to live with Munoz and his wife in Bakersfield. S.G. told her mother she could not live with her aunt and uncle, and then told her mother about the abuse. S.G.'s mother then asked B.G. whether S.G. was telling the truth, and he confirmed the abuse.

C. *The Investigation and the Charges*

On January 19, 2011, Ms. C.V. took S.G. and B.G. to the local sheriff's station to report the sexual abuse. On April 28, 2011, Detective Judith Salcedo came to the twins' school to interview them about the abuse. The detective interviewed Munoz on June 24, 2011, and interviewed S.G. again on June 27, 2011.

The court held a preliminary hearing on December 6, 2011 and on December 27, 2011, the district attorney filed the information, charging Munoz with two counts of continuous sexual abuse of a child under 14 years of age in violation of Penal Code section 288.5, subdivision (a). On September 26, 2012, the district attorney amended the information, adding two counts of commission of a lewd act upon a child under 14 years of age in violation of Penal Code section 288 subdivision (a). Munoz entered pleas of not guilty on all charges.

D. *The Trial*

Trial commenced on January 14, 2013. Both S.G. and B.G., who were 17 years old at the time of trial, testified. In addition, the twins' mother and Detective Salcedo testified.

The prosecution also presented expert testimony by a psychologist, Dr. Jayme Bernfeld, regarding child sexual abuse accommodation syndrome (CSAAS). According to Dr. Bernfeld, CSAAS is a model that describes behaviors (such as delayed reporting and recantation) commonly exhibited by victims of sexual abuse. She told the jury that CSAAS is useful in a trial involving sexual abuse because it helps to explain why victims of sexual abuse sometimes exhibit behaviors that might seem inconsistent with their allegations of abuse. She also explained that the CSAAS model should not be used to predict whether abuse actually occurred.

Munoz did not testify at trial. His wife, Martha, and one of his daughters, Mayra, testified on his behalf. In addition, five other character witnesses testified. Munoz also presented an expert, Dr. Scott Fraser, who opined CSAAS is scientifically unsound. Dr. Fraser also explained that, in his opinion, the veracity of a person's account of past events may be gleaned from the way in which particular details change or emerge over time.

E. *The Verdict and the Sentence*

The jury found Munoz guilty on both counts of continuous sexual abuse of a child under the age of 14, and not guilty on both counts of commission of a lewd act upon a child under the age of 14. The trial court imposed two consecutive 12-year terms of imprisonment. Munoz timely appealed.

DISCUSSION

1. *The Trial Court Did Not Abuse Its Discretion By Limiting The Total Number Of The Defendant's Character Witnesses To Five*

Munoz claims the trial court erred by allowing only five character witnesses to testify on his behalf, and argues the court's exclusion of his additional witnesses violated his right to present a defense and his right to due process and a fair trial as

guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. We disagree.

It is well established that a trial court “in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.) Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. (*People v. Mills* (2010) 48 Cal.4th 158, 195; *People v. Lucas* (2014) 60 Cal.4th 153, 268.) “ ‘Under the abuse of discretion standard, “a trial court’s ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.” [Citation.]’ [Citations.]” (*People v. Lewis* (2009) 46 Cal.4th 1255, 1286.)

At trial, defense counsel indicated to the prosecution that as many as 27 witnesses--Munoz’s friends, family, neighbors and coworkers--could testify to the defendant’s good character. Munoz argues here, as he did in the trial court, that the character evidence would cast doubt on the siblings’ version of events and reveal their allegations of sexual abuse against him to be “an inexplicable anomaly.” In evaluating the evidence under section 352, the trial court concluded the relevance of the proffered testimony was limited because sexual abuse is not generally discussed openly nor is it commonly witnessed by friends or family. Thus, it was extremely unlikely that any of the proffered witnesses would be able to offer any testimony directly relevant to the issues in the case. Further, the court observed that character witnesses in a sexual abuse case generally testify to the same basic perception, i.e., they know and like the defendant, and have never seen him do anything sexually inappropriate. The testimony of the five witnesses unfolded just as the trial court anticipated. The court balanced the limited probative value of the testimony against the time needed to present 27 character

witnesses and the likely cumulative effect of the testimony, and concluded five witnesses would be sufficient. The trial court did not abuse its discretion.

As for the defendant's concerns about his constitutional rights, we note that " '[a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense. Courts retain, moreover, a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice.' [Citation.]" (*People v. Jones* (1998) 17 Cal.4th 279, 305.) Such is the case here, where the trial court allowed the defense to present testimony about Munoz's good character, but reasonably limited the number of witnesses to testify in that regard. We see no indication on this record that the trial court's limitation on the number of character witnesses impermissibly infringed on Munoz's right to present a defense or deprived him of a fair trial.

2. *The Trial Court Properly Excluded The Defendant's Hearsay Statement Denying The Charge Of Sexual Abuse*

Munoz contends the trial court improperly restricted his right to cross-examine Detective Salcedo, the lead police investigator, in violation of his rights to present a defense and confront witnesses as guaranteed by the Sixth and Fourteenth Amendments. We disagree.

During direct examination, the prosecutor asked Detective Salcedo about her post-arrest interview with Munoz. She testified, among other things, that Munoz denied he ever babysat the twins, but then admitted he was sometimes present when his wife babysat the twins. On cross-examination, defense counsel sought to elicit the fact that, during the post-arrest interview, Munoz told Detective Salcedo he was innocent. The trial court ruled Munoz could not question Detective Salcedo about his declaration of innocence.

Munoz's declaration of innocence during the interview with Detective Salcedo, which the defense would have offered for its truth, is plainly hearsay. (Evid. Code, § 1200, subd. (a).) Munoz argues his declaration of innocence was admissible under Evidence Code section 356, which provides that where part of a conversation has been

introduced into evidence, the remainder of that conversation may be brought out by the opposing party. (See Evid. Code, § 356.) “ ‘The purpose of [Evidence Code section 356] is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed. [Citation.] Thus, if a party’s oral admissions have been introduced in evidence, he may show other portions of the same interview or conversation, even if they are self-serving, which “have some bearing upon, or connection with, the admission . . . in evidence.” ’ [Citation.]” (*People v. Williams* (2006) 40 Cal.4th 287, 319.) Relying on section 356, Munoz asserts that once the prosecution asked Detective Salcedo a question about the post-arrest interview with Munoz, the defense should have been allowed to bring in evidence of any and all statements made by Munoz during the interview. In so arguing, Munoz ignores that section 356 is indisputably “ ‘subject to the qualification that the court may exclude those portions of the conversation not relevant to the items thereof which have been introduced.’ ” (*Witt v. Jackson* (1961) 57 Cal.2d 57, 67; *People v. Harris* (2005) 37 Cal.4th 310, 334-335; Legis. Committee com. to Evid. Code, § 356.)

Here, as the trial court correctly observed, Munoz’s declaration of innocence was not relevant to the subject of Detective Salcedo’s testimony about the post-arrest interview, namely Munoz’s statements regarding whether he or his wife babysat the twins. Further, Munoz’s declaration does not explain or clarify why he gave two seemingly contradictory responses to Detective Salcedo during his interview. Accordingly, we find no error in the court’s exclusion of the defendant’s hearsay statement declaring his innocence.

Alternatively, Munoz argues the exclusion of his declaration of innocence deprived him of his fundamental constitutional rights, including his right to confront witnesses and to due process. We are not convinced. Trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on cross-examination. The right to confrontation is not unlimited. (*People v. Sully* (1991) 53 Cal.3d 1195, 1219.) Here, defense counsel subjected Detective Salcedo to vigorous cross-examination and we find no improper restriction in that regard.

Although Munoz focuses his argument on the right to cross-examine witnesses, Munoz's true complaint is about the court's exclusion of his hearsay statement, which he hoped to introduce during Detective Salcedo's cross-examination. On that issue, the United States Supreme Court has recognized that hearsay statements may be excluded in a criminal trial without impermissibly infringing upon a defendant's constitutional rights. Specifically, "[t]he hearsay rule, which has long been recognized and respected by virtually every State, is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact. Out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 298.) Our own Supreme Court has repeatedly held that post-crime and post-arrest declarations of innocence are inherently unreliable because the declarant has every reason "to deceive and seek to exonerate himself from, or at least to minimize his responsibility for, the shootings." (*People v. Edwards* (1991) 54 Cal.3d 787, 820, and cases cited therein.) Our courts also recognize that a defendant's hearsay statement, such as a declaration of innocence during a post-arrest interview, is properly excluded because its admission would effectively allow the defendant to testify without submitting to cross-examination. (*People v. Williams, supra*, 40 Cal.4th at p. 318 ["'As the trial court correctly determined, the circumstance that defendant made his statements during a postarrest police interrogation, when he had a compelling motive to minimize his culpability for the murder and to play on the sympathies of his interrogators, indicated a lack of trustworthiness. In past decisions, we have upheld the exclusion of self-serving postcrime statements made under similar circumstances.' [Citation.]"]].)

We find no error in the court's exclusion of Munoz's post-arrest statement declaring himself innocent.

3. *The Trial Court Did Not Err By Allowing Expert Testimony Regarding Child Sexual Abuse Accommodation Syndrome*

Munoz claims the trial court erred by allowing the prosecution to present expert witness testimony regarding child sexual abuse accommodation syndrome (CSAAS). He contends the testimony was irrelevant and prejudicial, and that its admission rendered his trial fundamentally unfair, thereby violating his due process rights. We disagree.

A trial court has broad discretion in deciding whether to admit or exclude expert testimony, and its decision will not be reversed on appeal unless a manifest abuse of discretion is shown. (*People v. McDowell* (2012) 54 Cal.4th 395, 426; *People v. McAlpin* (1991) 53 Cal.3d 1289, 1299.) Expert testimony is admissible on any subject sufficiently beyond common experience such that the opinion of an expert would assist the trier of fact. (Evid. Code, § 801, subd. (a); *People v. Brown* (2004) 33 Cal.4th 892, 905.)

It is well established that expert testimony regarding CSAAS is admissible for limited purposes in trials involving child sexual abuse. “[E]xpert testimony on the common reactions of child molestation victims is not admissible to prove that the complaining witness has in fact been sexually abused; it is admissible to rehabilitate such witness’s credibility when the defendant suggests that the child’s conduct after the incident – e.g., a delay in reporting – is inconsistent with his or her testimony claiming molestation.” (*People v. McAlpin, supra*, 53 Cal.3d at p. 1300 (*McAlpin*); *People v. Patino* (1994) 26 Cal.App.4th 1737, 1744 (*Patino*); *People v. Bowker* (1988) 203 Cal.App.3d 385, 393-394 (*Bowker*); see also *People v. Brown, supra*, 33 Cal.4th at p. 906.) “For instance, where a child delays a significant period of time before reporting an incident or pattern of abuse, an expert could testify that such delayed reporting is not inconsistent with the secretive environment often created by an abuser who occupies a position of trust.” (*Bowker, supra*, at p. 394.) “ ‘Such expert testimony is needed to disabuse jurors of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children’s seemingly self-impeaching

behavior. . . . The great majority of courts approve such expert rebuttal testimony.’ [Citation.]” (*McAlpin, supra*, at p. 1301.)

Consistent with these principles, the prosecution offered Dr. Bernfeld’s testimony to explain why children who have been sexually abused may delay reporting the abuse or may tolerate abuse over a long period of time, as S.G. and B.G. did here. Dr. Bernfeld advised the jury she had not interviewed S.G. or B.G. and was testifying as a general matter about behaviors sometimes observed in victims of sexual abuse. She stated repeatedly that CSAAS may not be used to evaluate or predict whether a person is a victim of sexual abuse.

Munoz appears to argue CSAAS evidence is unreliable within the meaning of Evidence Code section 801. This argument was rejected in *Bowker, supra*, 203 Cal.App.3d at p. 391, which holding the Supreme Court approved in *McAlpin, supra*, 53 Cal.3d at pp. 1300-1301. We decline Munoz’s invitation to depart from California law and adopt the contrary approach to CSAAS evidence taken by courts in Pennsylvania, Tennessee and Kentucky.

Munoz also asserts the testimony about CSAAS was irrelevant and inflammatory, and that its admission violated his due process rights and deprived him of a fair trial. We reject this argument because it conflicts with established precedent holding the “introduction of CSAAS testimony does not by itself deny appellant due process,” and we see no evidence here that Munoz failed to receive a fair trial. (*Patino, supra*, 26 Cal.App.4th at p. 1747.) Further, Munoz countered Dr. Bernfeld’s testimony by presenting his own expert. Dr. Scott Fraser offered a scathing criticism of CSAAS, opining the CSAAS model “has no scientific validity,” is “empirically invalid,” and “should never be used” in the legal system. The jury heard competing opinions on the value of CSAAS evidence and, consistent with well established California law, the court instructed the jury it was free to give each expert’s opinion whatever weight it deemed appropriate. (See, e.g., *People v. McDonald* (1984) 37 Cal.3d 351, 371 [“As is true of all expert testimony, the jury [was] free to reject it entirely after considering the expert’s opinion, reasons, qualifications, and credibility”]; accord Pen. Code, § 1127b.)

We find no error the trial court's admission of expert testimony regarding CSAAS.

4. *The Trial Court Properly Instructed The Jury That CSAAS Evidence Is Not Evidence That Molestation Actually Occurred*

Munoz contends that, even if Dr. Bernfeld's testimony regarding CSAAS was admissible, the trial court erred by using CALCRIM No. 1193 to instruct the jury concerning the proper use of her testimony. We disagree.

First, we note Munoz did not object to CALCRIM No. 1193 in the trial court. However, "a defendant need not assert an objection to preserve a contention of instructional error when the error affects the defendant's 'substantial rights.' [Citation.]" (Pen. Code, § 1259; *People v. Felix* (2008) 160 Cal.App.4th 849, 857.) Because Munoz alleges the instruction deprived him of due process and a fair trial, we address the substance of his arguments. We review a claim of instructional error de novo. (*People v. Guian* (1998) 18 Cal.4th 558, 569-570.)

Primarily, Munoz contends CALCRIM No. 1193 is legally erroneous. Prior to Dr. Bernfeld's testimony, the trial court instructed the jury, using CALCRIM No. 1193, as follows: "You will hear testimony from Dr. Bernfeld regarding child sexual abuse accommodation syndrome. Testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against him. You may consider this evidence only in deciding whether or not the conduct of the alleged victims in this case, the two children, was -- or whether their conduct was not inconsistent with the conduct of someone who has been molested and in evaluating the believability of [his or her] testimony." The court gave the jury a similar instruction prior to deliberations.

Munoz asserts this instruction failed to convey to the jury that the only relevance of CSAAS testimony is to disabuse the jury of misconceptions of how abused children may act generally. He also claims the instruction allowed the jurors to use CSAAS testimony to conclude the victims' claims of abuse were true. The plain language of the instruction refutes these arguments. Moreover, we note CALCRIM No. 1193 tracks the

language our courts have already approved for cases involving CSAAS testimony. (See *People v. Housley* (1992) 6 Cal.App.4th 947, 959 [“[I]n all cases in which an expert is called to testify regarding CSAAS we hold the jury must sua sponte be instructed that (1) such evidence is admissible solely for the purpose of showing the victim’s reactions as demonstrated by the evidence are not inconsistent with having been molested; and (2) the expert’s testimony is not intended and should not be used to determine whether the victim’s molestation claim is true”].)

We find no error in the trial court’s use of the standard CALCRIM instruction regarding the limited purpose of CSAAS evidence.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JONES, J.*

WE CONCUR:

EDMON, P. J.

ALDRICH, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.